SAM PENG THONG & ORS

v.

TETAP MERIAH SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-247-2001]
21 JUNE 2001

CIVIL PROCEDURE: *Injunction - Ex parte injunction - Whether ex parte injunction had lapsed before inter partes hearing - Whether court has inherent power to extend ex parte injunction - Rules of the High Court 1980, O. 29 r. 1(2B)*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Whether there were serious issues to be tried - Whether justice of the case lay in granting the injunction*

The plaintiffs, the owners of several units in a mall, had applied for and were granted *ex parte* an interlocutory injunction on 31 May 2001 restraining the defendant from discontinuing services in the said mall, with the hearing of the application by way of *inter partes* fixed on 21 June 2001. At the date of the hearing, the defendant contended that by reason of O. 29 r. 1(2B) of the Rules of the High Court 1980 ('RHC') the order granted on 31 May 2001 was only valid for 21 days and had lapsed on 20 June 2001. The defendant further argued that the court had no power to make an order to extend or affirm the order obtained *ex parte* beyond the 21 days as the court's power was restricted only to deciding whether to revoke or set aside the interlocutory injunction obtained.

Held:

[1] Since O. 29 r. 1(2B) of the RHC provides for the lapsing of the *ex parte* injunction order from the date on which it is granted, the reckoning of period of time as prescribed by O. 3 r. 2(2) of the RHC and s. 54(1)(a) of the Interpretation Acts 1948 and 1967 clearly runs immediately after that date, and as the order was obtained on 31 May 2001, time began to run from 1 June 2001 for purposes of calculation of the 21-day period and would end on 21 June 2001. Therefore, the application for the hearing *inter partes* of the *ex parte* injunction order on 21 June 2001 was within the 21-day period as prescribed by O. 29 r. 1(2B) of the RHC. (p 108 d-f)

[1a] The fixing of the return date for the *inter partes* hearing was to enable the judge to consider after hearing full arguments from both sides whether the *ex parte* injunction granted ought to be continued, varied, revoked or set aside; the court's powers could not by any stretch of imagination be limited only to revoking or setting aside the *ex parte* injunction at the *inter partes* hearing. (p 109 d-e)

[2] The question of whether there was a breach of the sales and purchase agreements and the deed of mutual covenants and whether the plaintiffs' use and enjoyment of the units purchased were subordinated to the will of the majority, and the question of *locus standi* were clearly serious issues which required a full trial. (p 111 c-d)

[2a] The plaintiffs would suffer greater injustice if relief was withheld. The balance as to the continuation of the injunction was more in favour of the plaintiffs and the justice of the case called for a continuation of the *ex parte* injunction against the defendants. (pp 111 h - 112 a)

[Interim injunction continued until trial.]

Case(s) referred to:
Cheah Cheng Lan v. Heng Yea Lee [2001] 1 CLJ 727
Elias Mooin & Anor v. Dato' Zainal Abidin Johari [1997] 3 CLJ 455
Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293

Legislation referred to:
Interpretation Acts 1948 & 1967, s. 54(1)(a)
Rules of the High Court 1980, O. 3 r. 2(2), O. 29 r. 1(2B), (2BA), O. 32 r. 13(2)(b), O. 42 r. 7

For the plaintiff - TS Chang (YF Wong); M/s Henry Soong & Chang
For the defendant - Wong Kok Leong; M/s Nik Hussain & Partners

Reported by Suresh Nathan

JUDGMENT

Syed Ahmad Helmy JC:
The plaintiff by encl. 5 applied on 31 May 2001 and was granted *ex parte* an interlocutory injunction upon the following terms:

(a) injunksi interlokutori untuk menahan dan menghalang pihak defendan sama ada dengannya sendiri atau melalui ejen atau pengkhidmatnya atau selainnya dari menghentikan operasi, perkhidmatan, servis, bekalan elektrik, bekalan air, perkhidmatan sekuriti, lampu, lif, tangga-bergerak dan pintu otomatik di bangunan yang dikenali sebagai Pacific Mall, Johor Bahru beralamat di Jalan Storey, 80300 Johor Bahru, Johor sehingga perintah selanjutnya;

(b) Plaintif-plaintif memberi suatu akujanji terhadap kerosakan pihak defendan (jika ada);

(c) Serahan perintah ini kepada pihak defendan dengan meninggalkan dan menampalkan di pintu hadapan satu salinan bermeterai perintah tersebut di alamat perniagaannya di Unit 3.16, Tingkat 3, Pacific Mall, Jalan Storey, 80300 Johor Bahru, Johor dan secara penampalan di pintu hadapan bangunan Pacific Mall, Jalan Storey, 80300 Johor Bahru, Johor adalah terpakai dan teratur terhadap defendan dan setiap orang pengarah-pengarah defendan secara peribadi;

(d) Kos permohonan dijadikan kos dalam kausa, dan

(e) Tarikh perbicaraan *inter partes* ditetapkan pada 21 Jun 2001.

The hearing of the application by way of *inter partes* was fixed on 21 June 2001.

At the *inter partes* hearing on 21 June 2001 the defendant who was represented by Mr. Wong Kok Leong advanced the argument that by reason of O. 29 r. 1(2B) RHC 1980 the *ex parte* injunctive order granted on 31 May 2001 is only valid for 21 days and accordingly lapses on 20 June 2001. It is the defendant's contention that since the operative words in O. 29 r. 1(2B) RHC is "from the date on which it was granted" the reckoning of time for determination of 21 days when the *ex parte* injunctive order lapses is to be calculated from the date when the injunction was granted namely 31 May 2001 and by reason thereof the date of 21 June 2001 fixed for *inter partes* hearing had exceeded the prescribed period by one day and hence there is no application before the court for *inter partes* hearing on 21 June 2001 as the *ex parte* interlocutory injunction had lapsed on 20 June 2001. In support of his argument he relies and cited O. 42 r. 7 and the case of *Elias bin Mooin & Anor v. Dato' Zainal Abidin bin Johari* [1997] 3 CLJ 455 which prescribes that a judgment or order takes effect from the date of its order.

I have carefully considered the argument advanced by the defendant's counsel and have no hesitation in holding that the contention is without merits. Though O. 29 r. 1(2B) RHC talks of lapsing of the *ex parte* injunctive order at the end of 21 days from the date on which it was granted the operative question is the calculation of time as to whether it is to be calculated from the date when the order was given. Under the Rules of the High Court 1980 reckoning periods of time is governed by O. 3 and r. 2(2) thereof clearly provides that "where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date". In the circumstances with respect I am unable to agree with the decision arrived at

in *Elias bin Mooin & Anor v. Dato' Zainal Abidin bin Johari* [1997] 3 CLJ 455. It is my respectful view that O. 42 r. 7 RHC is correct so far as the date when a judgment or order takes effect – namely from date of pronouncement or making. Calculation of time has to be read against the respective rule that is sought to be construed and in the context of this case O. 29 r. 1(2B) RHC provides that the lapsing of the injunctive order, unless sooner revoked or set aside, shall be "at the end of 21 days from the date on which it is granted". Since the words used are "from the date on which it is granted" that "is the specified date" for purposes of calculation of time.

In this connection I would also allude to s. 54(1)(a) of the Interpretation Acts 1948 and 1967 (Act 388) wherein it is expressly provided that "in computing time for the purposes of any written law … a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done".

Thus since r. 1(2B) O. 29 provides for the lapsing of the *ex parte* injunction order "from the date on which it is granted" the reckoning of period of time as prescribed by O. 3 r. 2(2) RHC and the s. 54(1)(a) of the Interpretation Act clearly runs immediately after that date and in the context of the facts of the case herein since the *ex parte* injunctive order was obtained on 31 May 2001 that day is excluded and time begins to run from 1 June 2001 for purposes of calculation of the 21 day period which time accordingly ends on 21 June 2001.

In the light of the aforesaid the application for the hearing *inter partes* of the *ex parte* injunction order on 21 June 2001 was within the 21 day period as prescribed by O. 29 r. 1(2B) RHC.

The defendant further advanced the argument that in fixing the *inter partes* hearing within the 21 day period the courts powers is restricted only to decide whether to revoke or set aside the interlocutory injunction obtained – the court has no powers to make an order to extend or affirm the order obtained *ex parte* beyond the 21 days. It is the defendant's submission that a fresh summons-in-chambers for *inter partes* injunction has to be filed if the plaintiff wants to obtain an *inter partes* injunction and in support thereof he relies on O. 29 r. 1(2B) RHC and the Court of Appeal decision of *Cheah Cheng Lan v. Heng Yea Lee* [2001] 1 CLJ 727.

Order 29 r. 1(2B) of the Rules of the High Court 1980 provides as follows:

((2B) Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of 21 days from the date on which it is granted.)

The thrust of r. 1(2B) RHC is to emphasise that an interim injunction order's lifespan is only limited to 21 days from the date on which it was granted unless it is sooner revoked or set aside – *Cheah Cheng Lan v. Heng Yea Lee* [2001] 1 CLJ 727.

The qualification "unless sooner revoked or set aside" relates to provision of a mechanism for a defendant who is unable to wait for the return date fixed to apply for an earlier date for the discharge or dissolution of the injunction – it cannot and does not put a fetter on the court's powers to be restricted only to ordering a revocation and setting aside of the interim injunction on the return date fixed as specified in r. 1(2BA) RHC. To apply such an interpretation would tantamount towards making the provision for *inter partes* hearing superfluous – for on that date the court cannot make any order except the revocation and/or setting aside.

Such an interpretation would be a contradiction in terms for which I am unable to accept. It is my considered view that no such restrictive interpretation ought to be placed on the court's powers. The fixing of the return date as required by r. 1(2BA) for *inter partes* hearing is clearly for the purpose of enabling the judge to consider after hearing full arguments from both sides whether the *ex parte* injunction granted ought to be continued, varied, revoked or set-aside – the courts powers cannot by any stretch of imagination be limited only to revoking or setting aside of the *ex parte* interim injunction at the *inter partes* hearing.

Having established that there is no fetter on the court to grant an order for the continuation of the *ex parte* interim injunction at the *inter partes* hearing on 21 June 2001 I shall now advert to the evidence presented and the arguments advanced by the parties in order to determine whether the *ex parte* injunction ought to be continued, revoked, set aside or varied.

Before delving into the merits of the case and the applicable principles thereof I would like to address the grievance raised by the defendant that he is unable to file in the affidavit in opposition as he is awaiting for detailed instructions and supporting documents from the defendants.

It is pertinent to note that the defendant has through its solicitors informed the court that they have filed in their defence on 20 June 2001 and upon perusing the defence it becomes obvious that the defence makes detailed references to the relevant Sale & Purchase Agreements & Deed of Mutual Covenants and the state of the accounts in relation to the service fee, which defence clearly indicates that the defendants must have given detailed instructions and submitted all relevant documents for the defendant's solicitors to embark upon the preparation and filing of the defence in the detailed manner

aforesaid. Hence I cannot accept the defendant's request for an adjournment as clearly if they are in a position to file such a detailed defence, it must be predicated by detailed instructions being given.

Under the provisions of the Rules of the High Court and in particular O. 32 r. 13(2)(b) the time frame for filing affidavits in opposition is 14 days from the date on which the affidavit he intends to reply was served on him. Order 32 r. 13(2)(b) RHC states:

> a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It must also be emphasised that in matters relating to injunctive reliefs it is imperative that all parties act with the utmost of urgency as to time.

As was stated by his Lordship Lamin Mohd Yunos PCA in *Cheah Cheng Lan v. Heng Yea Lee & Ors* [2001] 1 CLJ 727 at p. 732:

> It is because that the decision to revoke or set aside must be made within 21 days that the *ex parte* injunction once obtained must be served early (within seven days) so that the relevant parties may make the necessary preparation for appearing in Court within the said period.

That being the case and the fact of the detailed manner in which the defence was prepared and filed within the time frame of 14 days I cannot accept the defendant counsel's reason as to his inability to file an affidavit in opposition before the date fixed for hearing and accordingly proceeded with the hearing of the *inter partes* application in the absence of any affidavits by the defendants.

I have carefully scrutinised the plaintiff's application and the accompanying affidavits filed. The nature of the plaintiffs application for interim injunction restrains the defendant, its servants and or agents "dari menghentikan operasi, perkhidmatan, servis, bekalan elektrik, bekalan air, perkhidmatan sekuriti, lampu, lif, tangga-bergerak dan pintu otomatik" in the building known as Pacific Mall, Johor Bahru.

The applicable principles in the approach to be adopted by the courts in the granting or refusing of interlocutory injunction have been amply laid down by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293.

Applying the principle so established and directing myself in the manner as stated in *Keet Gerald Francis Noel John*'s case and evaluating the evidence as presented before me and available to the court I find that the plaintiffs have satisfied the first requirement of serious issues to be tried.

The plaintiff's claim as owners of the several units in the building known as Pacific Mall is for *inter alia* declaratory reliefs that the defendants letter of 15 May 2001 to close the mall and cease operation by 31 May 2001 amounts to a breach of the respective sale and purchase agreements and deed of mutual covenants. The defendant's defence is pivoted *inter alia* on the averment of *locus standi* by reason of the several assignments to the several financial institutions and that the use and enjoyment of the plaintiff's unit is subjected to the rights and interests of the majority of the owners of the units in the Complex.

Upon evaluating the cause papers and the supporting affidavit of Chia Yang Hock (encl. 4) the question of whether the defendant's letter dated 15 May 2001 tantamounts to a breach of the Sale & Purchase Agreements and the Deed of Mutual Covenants and whether the plaintiff's use and enjoyment of the units purchased and the common areas are subordinated to the will of the majority and the question of *locus standi* are clearly serious issues which needs to be ventilated by way of a full trial.

Having established that there are serious questions to be tried I shall now embark upon the second stage of the inquiry, namely where the justice of the case lies.

The available evidence before the court is the averments on oath made through the affidavit of Chia Yang Hock in encl. 4 namely that the premises in question are utilised for their business purposes and any intermeddling would affect the plaintiff's use and enjoyment of the premises which cannot be adequately compensated by damages. Though damages invariably may be an available remedy nevertheless the question is whether in the peculiar context of the case at hand the damages would be adequate. It is my finding that the relief of damages would be inadequate more so in the context of the scope of the injunction sought, namely to prevent the defendants from discontinuing with the services which they themselves have contractually agreed to provide under the Sale & Purchase Agreements and Deed of Mutual Covenants. The plaintiffs are not in any way stopping the defendants from embarking upon upgrading the Complex and there is absolutely no evidence to suggest that the upgrading necessitates a total closure of the Complex.

In the light of my finding aforesaid and after weighing them and also considering the scope of the injunction sought it is my conclusion that the plaintiffs herein would suffer greater injustice, if relief is withheld. It is also appropriate at this juncture for me to state that there is no evidence to suggest that the plaintiffs are in no financial position to meet their respective obligations. Clearly in the circumstances the balance as to the continuation of the injunction is more in favour of the plaintiffs and I accordingly come to

the decision that the justice of this case does call for the continuation of the *ex parte* injunction against the defendants and I accordingly ordered the continuation of the interim injunction obtained on 31 May 2001 until the trial of the action here.